



Signed and Filed: May 31, 2017

A handwritten signature in black ink, appearing to read "Hannah L. Blumenstiel".

HANNAH L. BLUMENSTIEL  
U.S. Bankruptcy Judge  
UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re: ) Case No. 13-30477 HLB  
MONICA H. HUJAZI, )  
Debtor. ) Chapter 7  
STERLING HEATLEY, ) Adv. Proc. No. 16-3027 HLB  
Plaintiff, )  
v. )  
MONICA H. HUJAZI, )  
Defendant. )

**MEMORANDUM DECISION FOLLOWING TRIAL**

On May 10, 2017, the court convened a trial on the complaint filed by Plaintiff Sterling Heatley. After Mr. Heatley closed and submitted his case-in-chief, the court issued an oral decision pursuant to Rule 52(c) of the Federal Rules of Civil Procedure, which applies in this adversary proceeding pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure. The court found and concluded that Mr. Heatley had failed to prove facts that enabled him to prevail on the claims asserted in his complaint.

MEMORANDUM DECISION FOLLOWING  
TRIAL

1 This is a core proceeding over which the court has subject  
2 matter jurisdiction pursuant to 28 U.S.C. §157(b)(2)(I) and in  
3 which it may enter a final judgment. This Memorandum Decision  
4 - in addition to the court's oral ruling of May 10 -  
5 constitutes the findings of fact and conclusions of law  
6 required by Rules 52(a) and 52(c) of the Federal Rules of Civil  
7 Procedure.

#### 8 I. FINDINGS OF FACT

9 Mr. Heatley became acquainted with Ms. Hujazi when he was  
10 a 23 year old novice real estate investor and agent, making  
11 "cold calls" to drum up business. They remained in touch and,  
12 in 2011, Mr. Heatley was involved as a buy-side agent in Ms.  
13 Hujazi's sale of real property located on 22<sup>nd</sup> Street in San  
14 Francisco.

15 Some months later, Mr. Heatley became interested in two  
16 properties that he viewed as good investments. The first, 376  
17 Ellis Street, San Francisco ("Ellis"), was an "off market"  
18 opportunity to which Mr. Heatley was introduced by a friend.  
19 Ellis is a residential apartment building with commercial space  
20 on the ground level. Mr. Heatley understood that Ellis' owner  
21 was trying to fend off foreclosure and was anxious to sell.  
22 Ms. Hujazi and Mr. Heatley do not dispute that Ellis was  
23 distressed, meaning that many of its commercial and residential  
24 units were vacant, that many of its tenants were not paying  
25 rent, and that there were many repair and maintenance problems.  
26 The building is located in a rough neighborhood, which  
27 contributed to the foregoing problems.  
28

1 The second property, 2400-2424 Bayshore Boulevard, San  
2 Francisco ("Bayshore"), was similarly situated to Ellis in  
3 terms of its mix of commercial and residential space; its  
4 neighborhood; and its tenancy, vacancy, and maintenance  
5 challenges.

6 Despite the problems associated with Ellis and Bayshore,  
7 Mr. Heatley believed he could turn them into profitable  
8 enterprises by making certain improvements, such as evicting  
9 non-paying tenants, improving security, renovating rental units  
10 and common areas, and securing stable tenants. Despite lacking  
11 the cash to pay for these improvements himself, Mr. Heatley  
12 entered into contracts to purchase Ellis and Bayshore. He then  
13 began to search for a partner and, during the course of that  
14 search, turned to Ms. Hujazi, who expressed interest.

15 On January 31, 2012, Mr. Heatley and Ms. Hujazi entered  
16 into an "Agreement to Assign Residential Income Property  
17 Purchase Agreement and Joint Escrow Instructions" with respect  
18 to Ellis (the "Ellis Assignment Agreement"). Pursuant to the  
19 Ellis Assignment Agreement, Mr. Heatley assigned to Ms. Hujazi  
20 his rights under a "Residential Income Property Purchase  
21 Agreement and Joint Escrow Instructions dated January 3, 2012"  
22 (the "Ellis Purchase Agreement"). As consideration for the  
23 Ellis Assignment Agreement, Ms. Hujazi agreed to pay to Mr.  
24 Heatley the sum of \$100,000, "to be in the form of equity stock  
25 in 376 Ellis Street LLC."<sup>1</sup>

26  
27 <sup>1</sup> The court received no evidence proving that 376 Ellis Street LLC was ever  
28 formed; rather, Mr. Heatley testified that, although he was not sure, he  
believed that 376 Ellis Street LLC was a "dba" that he and Ms. Hujazi used for  
purposes of managing Ellis. Despite the fact that 376 Ellis Street LLC does

1 On June 18, 2012, Mr. Heatley and the Zuercher Trust of  
2 1999 ("Zuercher"), a business trust of which Ms. Hujazi was the  
3 sole trustee and principal beneficiary, entered into an  
4 "Agreement to Assign Residential Income Property Purchase  
5 Agreement and Joint Escrow Instructions" with respect to  
6 Bayshore (the "Bayshore Assignment Agreement"). Pursuant to  
7 the Bayshore Assignment Agreement, Mr. Heatley assigned to  
8 Zuercher his rights under a "Residential Income Property  
9 Purchase Agreement and Joint Escrow Instructions" (the  
10 "Bayshore Purchase Agreement") in exchange for "an ownership  
11 interest in [Zuercher] equivalent to a capital contribution in  
12 the amount of \$100,000 or an 11.5% interest in 2400 Bay Shore  
13 Blvd LLC when it is established."<sup>2</sup> In addition, Zuercher agreed  
14 "to contribute \$100,000 towards the immediate capital  
15 improvements of [Bayshore]."

16 Ms. Hujazi paid approximately \$650,000 - \$700,000 of each  
17 of the purchase prices for Ellis and Bayshore. The balance of  
18 the purchase price for each property was funded by a loan,  
19 which was secured by a first deed of trust on each property.  
20 The court received no evidence identifying the lender or the  
21

---

22 not appear to have existed as a legal entity, the parties do not dispute that  
23 Mr. Heatley acquired an 11.5% ownership interest in Ellis, although no grant  
24 deed or other documentary proof of ownership was ever introduced into  
25 evidence. The parties also do not dispute that, at some point, Ms. Hujazi  
transferred or otherwise arranged for her 89.5% interest in Ellis to be held  
by SF Corners LLC ("SF Corners"), a California limited liability company of  
which she is the sole member and manager.

26 <sup>2</sup> The court received no evidence that 2400 Bay Shore Blvd LLC was ever formed  
27 or that Mr. Heatley received an ownership interest in Zuercher. The parties  
do not dispute, however, that Mr. Heatley acquired an 11.5% ownership interest  
28 in Bayshore, although no grant deed or other indicia of ownership was ever  
introduced into evidence.

MEMORANDUM DECISION FOLLOWING

TRIAL

1 amount of the loan pertaining to Bayshore, but Mr. Heatley did  
2 introduce the promissory note and deed of trust pertaining to  
3 Ellis. These documents prove that the lender was Sequoia  
4 Mortgage Capital, Inc. ("Sequoia") and that the  
5 borrowers/trustors were SF Corners and Mr. Heatley. The Deed  
6 of Trust was recorded on March 26, 2012. The principal amount  
7 of the promissory note was \$1,300,000.

8       From the time of the acquisition of Ellis and Bayshore  
9 until early 2014, Mr. Heatley served as property manager. He  
10 took on responsibility for hiring a contractor to make repairs  
11 and improvements, collecting rents, securing new tenants, etc.  
12 At that time and at all times relevant to this dispute, Mr.  
13 Heatley had unfettered access to the bank accounts he and Ms.  
14 Hujazi established for each property for the purposes of  
15 depositing rental income and paying expenses. Although he  
16 complained that he did not have a debit card or checks for the  
17 Ellis bank account, he offered no explanation as to why he  
18 could not have gotten those ubiquitous items of convenience,  
19 for Ms. Hujazi did so with no apparent difficulty.

20       Managing Ellis and Bayshore proved difficult, given the  
21 myriad problems from which the properties suffered. Mr.  
22 Heatley lays all of this at Ms. Hujazi's feet, claiming that,  
23 had she made the \$100,000 capital contributions Mr. Heatley  
24 contends she promised to provide, he could have made the  
25 improvements he deemed immediately necessary to stabilize the  
26 buildings and ultimately turn them around.

27       Ms. Hujazi claims she put some money in to each property,  
28 but the court received no evidence as to when or how much. And

1 between the time her entities and Mr. Heatley acquired the  
2 properties and early 2014, Ms. Hujazi was dealing with many  
3 personal and professional distractions. First and foremost,  
4 her mother was very ill and ultimately passed away. In  
5 addition, some of her other real estate projects were causing  
6 her great stress and financial pressure. The parties do not  
7 dispute that the drama in Ms. Hujazi's personal and  
8 professional life prevented her from participating in the day-  
9 to-day management of Ellis and Bayshore.

10 Not surprisingly, Ms. Hujazi blames Mr. Heatley for the  
11 failure to turn Ellis and Bayshore around. She claims that,  
12 when he approached her as a potential partner, she immediately  
13 recognized that stabilizing the properties would not be a "walk  
14 in the park." She claims that she repeatedly told Mr. Heatley  
15 that he would have to be a very hands-on manager. She also  
16 claims that she gave him carte blanche to do whatever he needed  
17 to do with the rental income from the properties in order to  
18 turn them around.

19 In early 2014, however, Ms. Hujazi claims she learned for  
20 the first time that real property taxes had not been paid for  
21 Ellis. She also maintains that, once she became aware of this  
22 issue, she also concluded that the assessed value for Ellis was  
23 \$1.0 million too high. But, Ms. Hujazi claims, it was by then  
24 too late to challenge the assessed value. For this, too, Ms.  
25 Hujazi blames Mr. Heatley, explaining that he had arranged for  
26 mail concerning Ellis to be delivered to the office from which  
27 he ran his real estate agent business, to which Ms. Hujazi did  
28 not have access.

1 At around the same time, Ms. Hujazi claims, she learned  
2 that the contractor hired by Mr. Heatley to do much of the  
3 construction work needed to renovate Ellis and Bayshore lacked  
4 a valid contractor's license and had done much of the work  
5 poorly and without the required permits. These problems, among  
6 others, caused Ms. Hujazi to step in and take over management  
7 of the properties.

8 According to Ms. Hujazi, she threw herself headlong into  
9 efforts to work with the City of San Francisco to obtain  
10 approvals of the unpermitted construction work, to clear other  
11 code violations, to re-do shoddy construction, to clear trash  
12 from the building, to evict non-paying tenants, and to rent  
13 vacant commercial and residential units. Ms. Hujazi testified  
14 that within three months of taking over the management of  
15 Ellis, she had increased monthly rental income from \$29,000 to  
16 \$41,000.<sup>3</sup> While she might have been successful in improving  
17 Ellis' monthly rent rolls, her heavy-handed approach did  
18 nothing to improve her relationship with Mr. Heatley, which was  
19 by then quite strained.

20 According to Mr. Heatley, Ellis did not generate income  
21 sufficient to pay the building's operating expenses. He was  
22 forced on many occasions, he claims, to pay operating expenses  
23 out of his own pocket, to the tune of approximately \$150,000.  
24 While he admits that he was reimbursed for a portion of these  
25 expenditures, he claims that more than \$100,000 remains

26  
27  
28 <sup>3</sup> Ms. Hujazi introduced no documentary evidence to corroborate her testimony  
on this point, but Mr. Heatley did not challenge her testimony.

1 outstanding and he demands that this "debt" be declared  
2 nondischargeable.

3       Mr. Heatley also grew increasingly frustrated by what he  
4 characterizes as Ms. Hujazi's willful refusal to give him  
5 copies of rent rolls, profit and loss statements, tax  
6 documents, etc. Eventually, he says, he was forced to obtain  
7 copies of bank statements directly from the bank and to try to  
8 recreate Ellis' business activity month by month, in an attempt  
9 to cobble together information sufficient to permit him to  
10 prepare his own tax returns.

11       During this process, Mr. Heatley claims to have discovered  
12 that Ms. Hujazi was regularly siphoning money out of Ellis'  
13 bank account and using it to pay personal expenses. He  
14 described large cash withdrawals; checks made out to Ms. Hujazi  
15 personally or to professionals he believes she hired to perform  
16 work unrelated to Ellis; and other unexplained transactions.  
17 Mr. Heatley also claims these amounts as his personal damages  
18 and demands that the court declare this debt nondischargeable.

19       Ms. Hujazi, of course, tells a very different story. She  
20 maintains that, whenever Mr. Heatley demanded information, she  
21 instructed one of her employees at Bay Cities Financial  
22 Corporation (a property management company) to give him  
23 whatever he wanted. She also admitted to using some of the  
24 rents generated by Ellis for personal expenses, but credibly  
25 testified that she repeatedly told Mr. Heatley that she needed  
26 and expected to be able to use some of Ellis' income for living  
27 expenses, never tried to hide such activity, and flatly denied  
28 the existence of any agreement prohibiting her from doing so.



1 As for other expenses, she denied that they had nothing to do  
2 with Ellis. As an example, she explained that she often asked  
3 her Bay Cities employees to take trash collected at Ellis to  
4 the dump for disposal, and that she gave these employees cash  
5 with which to pay disposal fees. She believed that any  
6 payments to professionals were appropriate because those  
7 professionals did work related to Ellis.

8 By July 2014, Mr. Heatley's frustration grew so great that  
9 he sued SF Corners in state court and succeeded in obtaining an  
10 order appointing a receiver over Ellis. Not long thereafter,  
11 however, Ms. Hujazi prevailed on her request to terminate the  
12 receivership. The order terminating the receivership makes Ms.  
13 Heatley responsible for payment of the receiver's fees and  
14 costs, including the receiver's attorney's fees. Both parties  
15 point to this receivership or the circumstances of its  
16 termination as evidence of the other's wrongdoing.

17 Further complicating all of these matters is the fact  
18 that, in September 2012, Ms. Hujazi caused Zuercher to file a  
19 voluntary petition for relief under Chapter 11 of the  
20 Bankruptcy Code (Case No. 12-32747). After Ms. Hujazi proved  
21 herself incapable of serving as a responsible individual for a  
22 debtor-in-possession, the court appointed a Chapter 11 Trustee.  
23 Eventually the case was converted to Chapter 7 and Ms. E. Lynn  
24 Schoenmann appointed as Chapter 7 Trustee. In March 2015, Ms.  
25 Schoenmann succeeded in selling Bayshore for \$3.1 million.

26 Mr. Heatley claims this price was well below Bayshore's  
27 fair market value, even though he participated actively in the  
28 sale process and never once objected to the proposed sale price

1 or the court's approval of the sale.<sup>4</sup> He now claims that Ms.  
2 Hujazi's misconduct; specifically, her allegedly fraudulent  
3 promise to make a \$100,000 capital contribution caused Bayshore  
4 to be sold for a depressed price and that this caused damage to  
5 Mr. Heatley in the form of diminution in the value of his 11.5%  
6 ownership interest.

7 Still further, in March 2013, several of Ms. Hujazi's  
8 creditors filed an involuntary bankruptcy petition against her  
9 in this court. After more than two years of fairly constant  
10 skirmishing, the court granted the petitioning creditors'  
11 motion for summary judgment and, on November 30, 2015, entered  
12 an order for relief against Ms. Hujazi under Chapter 7 of the  
13 Bankruptcy Code. Ms. Janina Hoskins was appointed trustee.

14 Ms. Hoskins took the position that she could control SF  
15 Corners, given that Ms. Hujazi was its sole member and manager.  
16 Stepping into Ms. Hujazi's shoes and again, after much  
17 litigation, Ms. Hoskins succeeded in selling Ellis in late 2016  
18 for \$4,475,000.

19 Out of this hopelessly tangled web arose this adversary  
20 proceeding, which Mr. Heatley filed on March 28, 2016. Mr.  
21 Heatley's complaint asserts three causes of action. He raises  
22 the first under section 523(a)(2)(A) of the Bankruptcy Code.  
23 In support of this claim, Mr. Heatley alleges that Ms. Hujazi  
24 fraudulently promised to make \$100,000 capital contributions  
25 toward the improvement of Bayshore and Ellis. He also alleges

26 \_\_\_\_\_  
27 <sup>4</sup> According to the court's review of its record, Mr. Heatley raised certain  
28 objections to the proposed sale procedures, some of which the court found  
well-taken. Mr. Heatley never objected to the proposed or final sale price or  
to final approval of the sale.

1 that Ms. Hujazi fraudulently promised to reimburse him for  
2 funds he spent to improve, repair, and maintain Ellis. Mr.  
3 Heatley claims that he justifiably relied on these fraudulent  
4 promises to his detriment and has suffered damages as a result.

5 Mr. Heatley asserts his second cause of action under  
6 section 523(a)(4) of the Bankruptcy Code. Here, he claims that  
7 Ms. Hujazi owed him fiduciary duties based on, alternatively,  
8 her status as a licensed real estate broker or as the sole  
9 manager of SF Corners and Zuercher, and as an allegedly  
10 competent asset manager. Mr. Heatley maintains that Ms. Hujazi  
11 breached these fiduciary obligations by committing fraud,  
12 embezzlement, and defalcation through her mismanagement of  
13 Ellis; her failure to make capital contributions toward the  
14 improvement of Ellis and Bayshore; her failure to reimburse Mr.  
15 Heatley for money he spent to improve, maintain, and repair  
16 Ellis; and her diversion and waste of Ellis' rental income by  
17 using a portion of it for personal and other expenses.

18 Mr. Heatley's third cause of action is based on section  
19 532(a)(6) of the Bankruptcy Code. In support of this cause of  
20 action, he contends that the same acts that allegedly  
21 constitute breaches of Ms. Hujazi's alleged fiduciary  
22 obligations were carried out with willful and malicious intent  
23 to cause him financial harm, which he argues has occurred.

24 As explained below, the court has concluded that Mr.  
25 Heatley has failed to prove that he is entitled to judgment on  
26 any of his claims for relief and that a judgment in Ms.  
27 Hujazi's favor is appropriate, pursuant to Rule 52(c) of the  
28 Federal Rules of Civil Procedure.

1           **II. CONCLUSIONS OF LAW**

2           Under Rule 52(c), "the court may enter judgment as a  
3 matter of law . . . with respect to a claim or defense that  
4 cannot under the controlling law be maintained or defeated  
5 without a favorable finding on that issue." Fed. R. Civ. P.  
6 52(c). Rule 52 expressly authorizes a trial court to resolve  
7 disputed issues of fact. In deciding whether to enter judgment  
8 on partial findings under Rule 52(c), the trial court is not  
9 required to draw any inferences in favor of one party or  
10 another; rather, the court "may make findings in accordance  
11 with its own view of the evidence." Ritchie v. U.S., 451 F.3d  
12 1019, 1023 (9th Cir. 2006).

13           **A. Section 523(a)(2)(A)**

14           A discharge of the type that Ms. Hujazi might someday  
15 receive under Bankruptcy Code section 727 does not discharge  
16 "an individual debtor from any debt . . . for money . . . to  
17 the extent obtain by false pretenses, a false representation,  
18 or actual fraud." 11 U.S.C. § 523(a)(2)(A). In order to  
19 prevail, the plaintiff must prove all of the following: (1)  
20 the existence of a misrepresentation, fraudulent statement or  
21 omission by the debtor; (2) that the debtor knew of the falsity  
22 or fraudulent nature of his or her statements or omissions or  
23 actions at the time they were made; (3) that the debtor  
24 intended to deceive the plaintiff; (4) that the plaintiff  
25 justifiably relied on the debtor's misrepresentations,  
26 omissions, or actions; and (5) that the plaintiff suffered  
27 damages as a result of that justifiable reliance. American  
28 Express Travel Related Servs. Co. v. Hashemi (In re Hashemi),

1 104 F.3d 1122, 1125 (9th Cir. 1996). The plaintiff must prove  
2 these elements by a preponderance of the evidence. Id.

3 **1. Alleged Fraudulent Statements or Omissions**

4 Mr. Heatley attributes several fraudulent  
5 misrepresentations to Ms. Hujazi. First, he claims that she  
6 falsely promised to contribute \$100,000 to the improvement of  
7 each of Ellis and Bayshore. Next, Mr. Heatley alleges that Ms.  
8 Hujazi falsely promised to reimburse him for all funds he paid  
9 out of pocket toward Ellis' expenses. Further, he maintains  
10 that she promised not to use Ellis' revenues to pay her  
11 personal expenses or that she fraudulently withheld from him  
12 the fact that she was doing so. Finally, Mr. Heatley argues  
13 that Ms. Hujazi fraudulently promised to increase his ownership  
14 share in Ellis from 11.5% to 15.38%.

15 **a. Alleged Promise of a \$100,000 Capital Contribution**  
16 **(Ellis).** At trial, Mr. Heatley pointed to the Ellis Assignment  
17 Agreement as the basis for his allegation that Ms. Hujazi  
18 falsely promised to contribute \$100,000 toward the improvement  
19 of Ellis. The Ellis Assignment Agreement contains no such  
20 promise. What it contains is a provision, pursuant to which  
21 Mr. Heatley was to receive an 11.5% membership interest in an  
22 LLC that the parties never formed. Instead, it appears (not  
23 because the court received evidence proving the point, but only  
24 because the parties did not dispute it) that Mr. Heatley  
25 received an 11.5% ownership interest in Ellis. The court  
26 received no other evidence - written or oral - that proved the  
27 existence of any promise on the part of Ms. Hujazi to make a  
28 \$100,000 contribution to the improvement of Ellis; nor did the

1 court receive any evidence from which it might reasonably infer  
2 such a promise. Accordingly, Mr. Heatley has failed to prove  
3 that Ms. Hujazi made any promise whatsoever to contribute  
4 \$100,000 to improve Ellis, let alone that she made any such  
5 promise fraudulently.

6 **b. Alleged Promise of a \$100,000 Capital Contribution**  
7 **(Bayshore).** Mr. Heatley points to the Bayshore Assignment  
8 Agreement as the source of Ms. Hujazi's alleged promise to  
9 contribute \$100,000 to the improvement of Bayshore. The  
10 Bayshore Assignment Agreement contains such a promise, but it  
11 is made by Zuercher, not Ms. Hujazi. The court received no  
12 briefing whatsoever as to how it might find Ms. Hujazi liable  
13 for a promise made by a business trust such as Zuercher.

14 But even if the court could find Ms. Hujazi liable for a  
15 promise made by Zuercher, in order for Mr. Heatley to prevail  
16 he must also prove that she made the promise with fraudulent  
17 intent. Unfortunately, he has failed to do that, too.

18 Mr. Heatley points to the fact that, by late September  
19 2012, Ms. Hujazi had caused Zuercher to file a voluntary  
20 petition for relief under Chapter 11 of the Bankruptcy Code as  
21 proof that, when Zuercher executed the Bayshore Assignment  
22 Agreement in June, Ms. Hujazi knew that Zuercher would never be  
23 able to fulfill its commitment to contribute \$100,000 towards  
24 Bayshore's improvement. The court is unable to draw such an  
25 inference.

26 Zuercher's Chapter 11 petition was filed on September 26,  
27 2012; the Bayshore Assignment Agreement was effective on June  
28 18, 2012. While that is a relatively short period of time, the

1 court is not willing to infer from timing alone that Ms. Hujazi  
2 knew, in mid-June 2012, that Zuercher would be seeking relief  
3 in the bankruptcy court by late September or that she  
4 fraudulently withheld that information from Mr. Heatley. There  
5 might be any number of reasons why Zuercher filed a bankruptcy  
6 petition, many of which could arise on relatively short notice.  
7 Without more probative evidence of Ms. Hujazi's fraudulent  
8 intent, the court is unable to find that she had such intent.

9 **c. Alleged Promise of Reimbursement.** The next  
10 fraudulent promise that Mr. Heatley attributes to Ms. Hujazi is  
11 one to reimburse him for all of the funds he expended for the  
12 improvement of Ellis. Some of this, Mr. Heatley admits, has  
13 been reimbursed and the amount he believes remains due totals  
14 approximately \$105,000.

15 There was no written agreement between Mr. Heatley and Ms.  
16 Hujazi governing their ownership or management of Ellis. Mr.  
17 Heatley testified that he believes that he and Ms. Hujazi owned  
18 Ellis as tenants in common and that this entitles him to  
19 reimbursement for all funds he expended to improve and/or  
20 maintain Ellis. Unfortunately, Mr. Heatley failed to introduce  
21 any documentary or other evidence proving that the parties'  
22 form of ownership of Ellis was, in fact, a tenancy in common.  
23 Mr. Heatley also failed to provide the court with any legal  
24 authority establishing the accuracy of his assumption  
25 concerning his entitlement to reimbursement.

26 Mr. Heatley did prove that he received reimbursement for  
27 some of the funds he expended, and he urges the court to infer  
28 from that an agreement to reimburse him for all such expenses.

1 Ms. Hujazi vehemently denied the existence of any unqualified  
2 reimbursement agreement; instead, she testified that she agreed  
3 to use Ellis' income to pay some expenses but not others. For  
4 example, Ms. Hujazi testified that she refused to approve  
5 reimbursement for certain payments made to the unlicensed  
6 contractor hired by Mr. Heatley.

7 Based on the parties' respective testimony (which is all  
8 the court has to go on given the absence of documentary  
9 evidence relevant to this issue), the court finds and concludes  
10 that there was no meeting of the minds between the parties  
11 concerning whether Mr. Heatley would be reimbursed for every  
12 single dollar he paid toward the improvement or maintenance of  
13 Ellis. Without a meeting of the minds, there can be no hard  
14 and fast promise, and certainly no fraudulent  
15 misrepresentation.

16 **d. Alleged Promise Not to Use Ellis' Revenues for**  
17 **Personal Expenses.** Mr. Heatley next alleges that Ms. Hujazi  
18 fraudulently promised not to use revenue generated by Ellis for  
19 personal purposes or that she fraudulently failed to tell Mr.  
20 Heatley that she was doing so. According to Mr. Heatley, Ms.  
21 Hujazi began siphoning off Ellis' income in 2014, after she  
22 took over management of the building. Ms. Hujazi told a  
23 different story. According to her, she repeatedly told Mr.  
24 Heatley that she needed to use "her" portion of Ellis' revenue  
25 to pay living expenses and never tried to hide such activity  
26 from Mr. Heatley.

27 Here again, without a written agreement governing the  
28 parties' ownership and management of Ellis, the court has



1 little to go on. Mr. Heatley suggests that, because the deed  
2 of trust encumbering Ellis gave Sequoia a security interest in  
3 Ellis and the rental income it generated, the court can infer  
4 on the part of Ms. Hujazi a promise not to use Sequoia's cash  
5 collateral for any purpose unrelated to satisfaction of the  
6 borrowers' obligation to Sequoia and payment of other debts  
7 relating to Ellis in order to prevent waste of or damage to  
8 Sequoia's collateral. Unfortunately, this evidence alone does  
9 not permit Mr. Heatley to prevail.

10 The grant of an interest in real property and its proceeds  
11 pursuant to a deed of trust does not mean a borrower/trustor  
12 may never use the income generated by the real property for any  
13 purpose other than to repay the debt to the beneficiary or to  
14 maintain or improve the property. Where a property generates  
15 income sufficient to service the debt secured by the property  
16 and to pay other expenses associated with the property, the  
17 borrower/trustor is free to use any remainder in any fashion he  
18 or she sees fit.

19 At no point during trial did Mr. Heatley provide the court  
20 with any evidence of Ellis's income or expenses, aside from a  
21 single statement of account from Sequoia that indicated that  
22 the monthly payment on its debt totaled \$10,822.50. Beyond  
23 this, the court received only Ms. Hujazi's testimony, in which  
24 she insisted that, when she took over Ellis' management, it  
25 generated approximately \$29,000/month in rents and, just three  
26 months later, it generated approximately \$41,000 per month in  
27 rents. This income stream should have been sufficient to  
28 service the debt to Sequoia. And according to the Sequoia

1 statement of account, it was. Between March 23, 2012 and July  
2 2014, the required payment to Sequoia was made each month,  
3 albeit late on occasion. Thus, even if the court construes the  
4 Sequoia deed of trust as a promise not to use Ellis' revenues  
5 for any purpose other than repayment of the debt to Sequoia, it  
6 appears that promise was kept, at least between March 23, 2012  
7 and July 2014.

8 But more to the point, the court simply found Ms. Hujazi  
9 more credible than Mr. Heatley. Ms. Hujazi consistently denied  
10 that she promised not to use Ellis' revenue for any purpose  
11 unrelated to that building. She also testified convincingly  
12 that she made no effort to hide her use of Ellis' revenue from  
13 Mr. Heatley. On this point in particular, Ms. Hujazi's  
14 testimony is corroborated by Mr. Heatley's, in which he  
15 admitted that (a) he always had access to the bank account he  
16 and Ms. Hujazi used to operate Ellis; and (b) Ms. Hujazi could  
17 do whatever she wanted with her share of Ellis' revenue. With  
18 these admissions, Mr. Heatley helped convince the court that  
19 Ms. Hujazi neither fraudulently promised never to use Ellis'  
20 revenue for any personal expenses nor fraudulently hid such  
21 activity from him.

22 **e. Alleged Promise of a 15.38% Ownership Interest.** In  
23 his complaint and trial brief, Mr. Heatley argued that Ms.  
24 Hujazi fraudulently promised to increase his share in Ellis  
25 from 11.5% to 15.38%. During trial, however, he failed to  
26 introduce a single shred of evidence - written or oral - that  
27 proved the existence of any such promise.  
28

1           **2.    Causation.**

2           With respect to the alleged promises of \$100,000  
3 contributions to the improvement of Ellis and Bayshore, Mr.  
4 Heatley contends that Ms. Hujazi's failure to keep these  
5 promises damaged him by diminishing the value of Ellis and  
6 Bayshore, which in turn diminished the value of his interest in  
7 those properties. Mr. Heatley has failed to prove that  
8 allegation.

9           He admitted that both properties were troubled when he, SF  
10 Corners, and Zuercher acquired them. The parties do not  
11 dispute that they were never able to completely cure the  
12 problems from which the properties suffered during the time  
13 they owned them. The parties also do not dispute that both of  
14 them assumed responsibility for managing the building, albeit  
15 at different times. The court received no evidence whatsoever  
16 that ties any diminution in value (to the extent there was one  
17 - a fact that went unproven at trial)<sup>5</sup> to acts carried out  
18 exclusively by Ms. Hujazi. Without such proof, Mr. Heatley  
19 cannot prevail on his claim that these allegedly fraudulent  
20 promises caused him any form of damage.

21           **B.    Section 523(a)(4)**

22           The Bankruptcy Code renders nondischargeable any debt for  
23 "fraud or defalcation while acting in a fiduciary capacity,  
24 embezzlement, or larceny." In his complaint, Mr. Heatley  
25 alleged that Ms. Hujazi "acted in a fiduciary capacity . . .  
26 based upon her disclosed status as a licensed real estate

27 \_\_\_\_\_  
28 <sup>5</sup> See footnote 4. Mr. Heatley also did not oppose the sale of Ellis.

1 professional, competent asset manager, and sole manager of her  
2 controlled entities." He goes on to complain that Ms. Hujazi  
3 "breached her fiduciary duties to [him] while acting in a  
4 fiduciary capacity" and "committed defalcations while acting in  
5 a fiduciary capacity." In his trial brief, Mr. Heatley changed  
6 his tune, arguing not only that Ms. Hujazi had committed fraud  
7 or defalcation while acting in a fiduciary capacity, but that  
8 she had embezzled several hundred thousand dollars from . . .  
9 both properties."<sup>6</sup>

10 **1. Fraud or Defalcation in a Fiduciary Capacity.**

11 To prevail under this facet of section 523(a)(4), Mr.  
12 Heatley must prove not only that Ms. Hujazi committed fraud or  
13 defalcation, but that she acted in a fiduciary capacity when  
14 doing so. Honkanen v. Hopper (In re Honkanen), 446 B.R. 373,  
15 378 (B.A.P. 9th Cir. 2011) (citing In re Teichman, 774 F.2d  
16 1395, 1398 (9th Cir. 1985)).

17 The court has already found and concluded that Ms. Hujazi  
18 did not act fraudulently, so Mr. Heatley's success depends upon  
19 proving that Ms. Hujazi committed defalcation while acting in a  
20 fiduciary capacity. Unfortunately, he has failed on both  
21 counts.

22 **a. Fiduciary Capacity.** The broad definition of  
23 fiduciary under nonbankruptcy law - a relationship involving  
24 trust, confidence, and good faith - does not apply in the

25 \_\_\_\_\_  
26 <sup>6</sup> This quote marks the first and only time Mr. Heatley alleged that Ms. Hujazi  
27 misused revenue generated by Bayshore, as well as Ellis. At trial, Mr.  
28 Heatley introduced no evidence whatsoever pertaining to revenue generated by  
Bayshore, Bayshore's expenses, or Ms. Hujazi's use or misuse of Bayshore  
revenue. Accordingly, the court will analyze Mr. Heatley's 523(a)(4) claim as  
pertaining to Ellis only.

1 dischargeability context, in which the Ninth Circuit has  
2 adopted a much narrower definition of "fiduciary." Honkanen,  
3 446 B.R. at 378 (citing Cal-Micro, Inc. v. Cantrell (In re  
4 Cantrell), 329 F.3d. 1119, 1125 (9th Cir. 2003); Lewis v. Short  
5 (In re Short), 818 F.2d 693, 695 (9th Cir. 1987); Ragsdale v.  
6 Haller, 780 F.2d 794, 796 (9th Cir. 1986); Woosley v. Edwards  
7 (In re Woosley), 117 B.R. 524, 529 (B.A.P. 9th Cir. 1990)).  
8 The fiduciary relationship must be one arising from an express  
9 or technical trust. Honkanen, 446 B.R. at 378-79. "Fiduciary"  
10 in this context is therefore a narrowly construed question of  
11 federal law, although state law can be consulted "to ascertain  
12 whether the requisite trust relationship exists." Cantrell,  
13 329 F.3d at 1125 (citations omitted).

14 For many of the past 25 years, courts within the Ninth  
15 Circuit have applied a combined statutory and caselaw analysis  
16 to determine the existence of fiduciary capacity. These courts  
17 focused on duties arising under state law, rather than on  
18 duties arising from the existence of an express trust.  
19 Accordingly, courts found that various professionals, when  
20 acting as such, were fiduciaries for purposes of section  
21 523(a)(4). See, e.g., Woosley, 117 B.R. at 529 (California  
22 real estate broker is a fiduciary); Lock v. Scheuer (In re  
23 Scheuer), 125 B.R. 584, 592 (Bankr C.D. Cal. 1991) (securities  
24 broker is a fiduciary).

25 Caselaw has evolved, however, and the current rule  
26 recognizes that state law fiduciary duties alone are  
27 insufficient to establish the fiduciary capacity required by  
28 section 523(a)(4). Honkanen, 446 B.R. at 378-79 ("[t]o fit

1 within § 523(a)(4), the fiduciary relationship must be one  
2 arising from an express or technical trust that was imposed  
3 before, and without reference to, the wrongdoing that caused  
4 the debt"); Evans v. Pollard (In re Evans), 161 B.R. 474, 478  
5 (B.A.P. 9th Cir. 2001) (even if a court finds that there are  
6 general fiduciary duties between the parties, that is "not  
7 sufficient [if there is an] absence of an express or technical  
8 trust relationship with an identifiable trust res"). In order  
9 for a fiduciary relationship of the type required by section  
10 523(a)(4) to exist, the applicable state law must clearly  
11 define fiduciary duties and identify trust property. Id.  
12 (citing Runnion v. Pedrazzini (In re Pedrazzini), 644 F.2d 756,  
13 759 (9th Cir. 1981) (emphasis added)). Accordingly, the fact  
14 that the defendant is a real estate broker is insufficient to  
15 cause liability to adhere under section 523(a)(4) unless a  
16 plaintiff can also prove the existence of an express or  
17 technical trust.

18 In the case at bar, the parties do not dispute that Ms.  
19 Hujazi was, during the period of time relevant to this  
20 adversary proceeding, a licensed California real estate broker.  
21 This means that, under certain circumstances, Ms. Hujazi served  
22 as a fiduciary and acted in a fiduciary capacity.

23 Those circumstances are not presented here, for several  
24 reasons. First, both the Ellis Assignment Agreement and the  
25 Bayshore Assignment Agreement contain express disclaimers  
26 stating: "Assignor, Assignee, and/or their respective  
27 affiliates or principals, are licensed real estate brokers;  
28 however, none of said parties are acting in their capacity as

1 licensed real estate brokers with respect to this transaction."  
2 Accordingly, Mr. Heatley's argument that Ms. Hujazi acted in a  
3 fiduciary capacity with respect to any promises made in those  
4 agreements must fail.

5 The court also received no evidence or argument that  
6 supports a finding that Ms. Hujazi acted in her capacity as a  
7 licensed real estate broker in managing Ellis or that the facts  
8 proved at trial established the existence of an express or  
9 technical trust under California law. The evidence Mr. Heatley  
10 introduced proves only that SF Corners and Mr. Heatley co-owned  
11 Ellis, that Mr. Heatley and Ms. Hujazi both assumed  
12 responsibility for managing Ellis at various times, and that  
13 beyond that, they were unable to agree on much. None of that  
14 proves the existence of an express or technical trust under  
15 California law sufficient to show that any debts owed by Ms.  
16 Hujazi to Mr. Heatley should be declared nondischargeable under  
17 section 523(a)(4). Keitel v. Heubel, 126 Cal. Rptr. 2d 763,  
18 773 (Ct. App. 2002) (under California law, an express trust  
19 requires five elements: (a) present intent to create a trust;  
20 (b) a trustee; (c) trust property; (d) proper legal purpose;  
21 and (e) a beneficiary); Royal Indem. Co. v. Sherman, 269 P.2d  
22 123, 125 (Cal. Ct. App. 1954) (describing technical trusts  
23 under California law as "those arising from the relation of  
24 attorney, executory, or guardian, and not debts due by a  
25 bankruptcy in the character of an agent, factor, commission  
26 merchant, and the like"); Young v. Clark, 93 P. 1056, 1057  
27 (Cal. Ct. App. 1907) (a technical trust is not implied by  
28 contract).

1       The same holds true for Mr. Heatley's arguments that Ms.  
2 Hujazi acted as a fiduciary by allegedly holding herself out to  
3 be a "competent asset manager" or by serving as "sole manager  
4 of her controlled entities." Neither of these theories were  
5 developed in Mr. Heatley's trial brief beyond these conclusory  
6 statements, and Mr. Heatley did not cite to any legal authority  
7 that might support them. Having failed to prove the elements  
8 necessary to establish the existence of an express or technical  
9 trust, Mr. Heatley's claim that Ms. Hujazi acted in a fiduciary  
10 capacity fails.

11       **b. Defalcation.** Even if Ms. Hujazi can somehow be shown  
12 to have acted in a fiduciary capacity, Mr. Heatley failed to  
13 prove that Ms. Hujazi committed defalcation while acting in  
14 that capacity. A "defalcation" under section 523(a)(4)  
15 requires the "misappropriation of trust funds or money held in  
16 any fiduciary capacity; [or the] failure to properly account  
17 for such funds." Stephens v. Bigelow (In re Bigelow), 271 B.R.  
18 178, 186 (B.A.P. 9th Cir. 2001). Defalcation requires a  
19 culpable state of mind, involving knowledge of, or gross  
20 recklessness in respect to, the improper nature of the relevant  
21 fiduciary behavior." Bullock v. BankChampaign, N.A., 133 S.Ct.  
22 1754, 1759 (2013).

23       The court has already found that Ms. Hujazi did not  
24 misappropriate money that came into her hands as the result of  
25 her management of Ellis. She also did not fail to properly  
26 account for such funds, as whenever Mr. Heatley requested  
27 financial information, Ms. Hujazi instructed her employees to  
28 provide him with whatever he wanted. In addition, Mr. Heatley



1 did not argue that Ms. Hujazi somehow secreted money away;  
2 rather, he concedes that all transactions - even those he  
3 contends were improper - were run through the dedicated bank  
4 account that the parties established for Ellis. Mr. Heatley  
5 concedes that, during all periods relevant to this action, he  
6 had unfettered access to that account and was able to obtain  
7 bank statements, copies of checks, etc.

8 Ms. Hujazi also lacked the state of mind necessary to  
9 prove culpability for defalcation. The court has already  
10 concluded that she did not act fraudulently, and the evidence  
11 also fails to prove that she was grossly reckless. She tried  
12 to do what she believed was right. The fact that she failed,  
13 even failed miserably, does not mean she committed defalcation.

## 14 **2. Embezzlement.**

15 As the court has previously noted, Mr. Heatley devotes  
16 just half a sentence of his trial brief to embezzlement as  
17 grounds for a finding of nondischargeability under section  
18 523(a)(4). His complaint does not allege embezzlement at all.  
19 The evidence Mr. Heatley presented at trial does nothing to  
20 strengthen this extremely weak reed.

21 In adversary proceedings such as this, federal law  
22 provides the definition of embezzlement. First Delaware Life  
23 Ins. Co. v. Wada (In re Wada), 210 B.R. 572, 576 (B.A.P. 9th  
24 Cir. 1997). In order to prevail, Mr. Heatley must prove all of  
25 the following: (1) property rightfully in the possession of a  
26 nonowner; (2) the nonowner's appropriation of the property to a  
27 use other than that to which it was entrusted; and (3)  
28 circumstances indicating fraud. Transamerica Commercial Fin.

1 Corp. v. Littleton (In re Littleton), 942 F.2d 551, 555 (9th  
2 Cir. 1991). Mr. Heatley bears the burden of proving these  
3 elements by a preponderance of the evidence. Grogan v. Garner,  
4 498 U.S. 279, 286 (1991).

5 Mr. Heatley failed to prove a single one of these  
6 requirements. First, Mr. Heatley admitted that Ms. Hujazi was  
7 at least a part owner of the income generated by Ellis.  
8 Accordingly, she was not a "nonowner" as must be shown in order  
9 to prevail on an embezzlement claim. Second, and as the court  
10 has already concluded, Ms. Hujazi did not misappropriate  
11 property. Finally, and as the court has already concluded, no  
12 circumstances indicating fraud exist. Mr. Heatley's claim of  
13 embezzlement cannot stand.

14 **C. Section 523(a)(6)**

15 A bankruptcy discharge does not relieve an individual  
16 debtor from any debt "for willful and malicious injury by the  
17 debtor to another entity or to the property of another entity."  
18 11 U.S.C. § 523(a)(6). In order to prevail on a claim under  
19 section 523(a)(6), the plaintiff must prove by a preponderance  
20 of the evidence that the defendant's conduct was both willful  
21 and malicious. Ormsby v. First Am. Title Co. (In re Ormsby),  
22 591 F.3d 1199, 1206 (9th Cir. 2010); Barboza v. New Form, Inc.  
23 (In re Barboza), 545 F.3d 702, 706 (9th Cir. 2008) (the  
24 "willful" requirement is separate and distinct from the  
25 "malicious" requirement); Jett v. Sicroff (In re Sicroff), 401  
26 F.3d 1101, 1106 (9th Cir. 2005) (burden of proof).

27 Willfulness requires a "deliberate or intentional injury,  
28 not merely a deliberate or intentional act that leads to

1 injury." Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998); Ditto v.  
2 McCurdy, 510 F.3d 1070, 1078 (9th Cir. 2007) (same). Put  
3 another way, the defendant must intend the consequence of the  
4 act, not simply the act itself, in order for a debt caused by  
5 that act to be declared nondischargeable under section  
6 523(a)(6). Ormsby, 591 F.3d at 1206.

7 For purposes of section 523(a)(6), the Ninth Circuit has  
8 adopted a subjective standard. Carillo v. Su (In re Su), 290  
9 F.3d 1140, 1146 (9th Cir. 2002). Willfulness requires a  
10 "subjective motive to inflict injury" or a subjective belief  
11 that "injury is substantially certain to result" from one's  
12 conduct in order for liability under section 523(a)(6) to  
13 adhere. Ormsby, 591 F.3d at 1206.

14 Malicious injury "involves (1) a wrongful act, (2) done  
15 intentionally, (3) which necessarily causes injury, and (4) is  
16 done without just cause or excuse." Ormsby, 591 F.3d at 1207.  
17 Malice may be implied from the wrongful nature of the act  
18 itself. Thiara v. Spycher Bros. (In re Thiara), 285 B.R. 420,  
19 434 (B.A.P. 9th Cir. 2002). Malice does not require a showing  
20 of biblical malice, i.e., personal hatred, spite, or ill will.  
21 Thiara, 285 B.R. at 434 n. 15 (citing McIntyre v. Kavanaugh),  
22 242 U.S. 138, 141-42 (1916)).

23 In his complaint, Mr. Heatley accuses Ms. Hujazi of  
24 conning him into providing her access to Ellis' bank account  
25 and thereafter using that account to line her own pockets,  
26 while Ellis fell into disrepair and was ultimately lost. In  
27 his trial brief, Mr. Heatley once again changed his story,  
28 accusing Ms. Hujazi of raiding bank accounts for both Ellis and

1 Bayshore. The only proof introduced by Mr. Heatley pertained  
2 strictly to Ellis, so the court will not consider his claim  
3 that Ms. Hujazi raided Bayshore's coffers, too. In any event,  
4 Mr. Heatley's claim fails.

5 **1. Alleged Willful Conduct.**

6 For many of the same reasons that the court declined to  
7 find that Ms. Hujazi made fraudulent representations to Mr.  
8 Heatley or that she fraudulently withheld information from him,  
9 the court declines to find that Ms. Hujazi engaged in willful  
10 conduct sufficient to support a finding that any debts she  
11 might have owed to Mr. Heatley are nondischargeable under  
12 section 523(a)(6). Mr. Heatley presented not a shred of  
13 evidence that suggests Ms. Hujazi deliberately intended to  
14 injure him.

15 Ms. Hujazi admitted to using Ellis' revenue for personal  
16 expenses, but she credibly testified that she did not use  
17 Ellis' revenue to the extent Mr. Heatley suggests, that she had  
18 told him she would do so, that she never tried to hide it from  
19 him, and that she and Mr. Heatley had not agreed otherwise.  
20 This course of conduct might not have been wise, but the court  
21 finds it was neither fraudulent nor malicious.

22 With respect to Mr. Heatley's allegation that Ms. Hujazi  
23 falsely promised to reimburse him for all expenses, the court  
24 reiterates its finding that she made no such promise. Again,  
25 the evidence introduced by Mr. Heatley proved only that Ms.  
26 Hujazi agreed that Ellis' revenue could be used to reimburse  
27 some - not all - of Mr. Heatley's expenses. And Ms. Hujazi  
28 credibly testified that she disagreed with other expenses, such

1 as, for example, those relating to work done by an unlicensed  
2 contractor (hired by Mr. Heatley) who failed to obtain  
3 necessary permits.

4 Mr. Heatley failed to prove that Ms. Hujazi possessed a  
5 subjective intent to cause him financial injury; therefore, he  
6 is not entitled to judgment in his favor on his claim under  
7 section 523(a)(6).

## 8 **2. Alleged Malicious Conduct.**

9 Mr. Heatley also has failed to prove that Ms. Hujazi's  
10 conduct was malicious. As explained in the court's discussion  
11 of his claim under section 523(a)(2)(A), Mr. Heatley has failed  
12 to prove that Ms. Hujazi's refusal to agree to reimbursement of  
13 all funds Mr. Heatley expended toward Ellis' improvement or her  
14 use of Ellis' income for certain personal expenses were  
15 wrongful acts. Although he described her use of Ellis' income  
16 for personal expenses as improper, he later admitted that she  
17 could use "her" share of Ellis' revenues in whatever manner she  
18 wished. And Ms. Hujazi's testimony concerning why she would  
19 not agree to reimburse Mr. Heatley for certain expenses was  
20 credible. In light of this, the court cannot conclude that Ms.  
21 Hujazi's conduct was malicious; therefore, Mr. Heatley cannot  
22 prevail on his section 523(a)(6) claim.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**III. CONCLUSION**

For the foregoing reasons, the court finds in favor of Ms. Hujazi on all counts asserted in Mr. Heatley's complaint. The court will separately enter a judgment.

**\*\*END OF ORDER\*\***

Court Service List

[None]